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IN THE

Supreme Court of the United States

October Term, 1963

DALE ROSS,
Petitioner,
vs.
GREAT NORTHERN RAILWAY COMPANY, A Corporation,
Respondent.
No. 241

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The respondent's brief in opposition does not meet the petition. In the main it merely urges contentions made in the courts below.

After reading respondent's brief one might well ask: "In whose favor was the verdict in the trial Court? For respondent's argument would be valid only if the verdict were for the defendant.

The jury after reviewing all the evidence returned a verdict for the Plaintiff.

RESPONDENT'S POSITION IS NOT SUPPORTED BY THE RECORD

1. The Petitioner has not misstated the record in this case. Petitioner printed pertinent portions of the record which substantiated the verdict of the jury. In addition, the Petitioner DEMONSTRATED the placement and movement, folding, and unfolding, of the tarpaulin on the top of the trailer (R. 96-101).

2. Respondent does not attempt to negative Petitioner's assertion that the courts below in deciding questions of law, ignored the clear rule of this Court that the reviewing Court must assume as established all facts in support of Plaintiff's claim that the evidence reasonably tends to prove and all favorable inferences flowing from such evidence.

3. Respondent does not attempt to show evidence supporting other possible causes of the Petitioner's catapulting fall. The personal attack upon the Petitioner's counsel by the respondent ignores their absence of proof at the trial to support any of the lower courts' rulings. They fail to recognize, discuss or controvert the circumstantial evidence of this case surrounding the occurrence which justified reasonable jurors in concluding that the thing charged was the prime and moving cause of the Plaintiff's injuries. Respondent, at page 3 of their brief declare that there was no evidence or testimony OF THE FOLDS OF THE TARPAULIN BECOMING HUNG UP. Yet, at the top of page 3 of their brief they point out direct testimony of the Plaintiff as follows:

"A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was *holding up*, . . ."

4. The evidence of the Plaintiff, the circumstantial evidence and inferences flowing from it all could be considered by the jury in the light of the instructions of the court when he narrowed the issue by instructing the jury as follows: "That the sole and only basis upon which it is asserted that this defendant was negligent was the evidence concerning whether or not there was or was not wires in one or more of the eyelets of the tarpaulin; that the jury must not discuss or consider or speculate or conjecture about anything else than that" (R 461-462) (Our petition p. 11-12). " . . . Does the evidence show, can you find from this evidence that if there were wires in the tarpulin where they were located, what, if anything, did they have to do as far as the evidence discloses with this accident?" (R 461-462). (Our petition p. 11-12).

5. The jury complied with these instructions; they found the sharp wires in the eyelets, supported by the record (R 102) (Our petition Appendix C-p. 48-49) (R 380-382) (R 401) (Our petition Appendix C-p. 59-61). When the Plaintiff Ross testified he was "catapulted" to the ground "I did not touch the side of the car" (R 113). Our petition Appendix C-p. 54) the jury found from the circumstantial evidence and the reasonable inferences flowing therefrom that an agency within the tarpaulin caused him to be thrown off. This was corroborated by witness Griffin as follows: (R 383)

Q. Do you know whether or not he fell clear of the load or was it kind of a sliding fall?

A. I have the impression that he fell quite clear of the load, because I immediately jumped down and he was away from the side of the car.

Q. There was, as I understand it, no sliding down the load, ricocheting?

A. No.

6. The reasons advanced by the circuit court's finding of contributory negligence in support of the respondent railroad's theme is based on testimony that at best merely conflicts in favor of defendant railroad. In passing on the correctness of this theory, the courts below, could not in conformity with the rule established by this court, even consider, much less accept such testimony-evidence, if any, for respondent as against the conflicting testimony for Plaintiff Ross. The jury passed on such conflicts and found by a specific interrogatory propounded by the court that Plaintiff was NOT CONTRIBUTORILY NEGLIGENT (R 462-463).

7. The *Frescoln vs. Puget Sound Traction*, L. S. P. Co. case of 90 Wash. 59, 155, p. 395, and *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 182, 135 Pac. 804, are the ruling decisional law in Washington on circumstantial evidence cases similar to this cause. Respondent does not controvert these rules.

The Petitioner has printed the applicable portions of the record in Appendix C (Petitioner's Brief, pages 48-64) for this Court's consideration. In addition, the Petitioner at the District Court trial DEMONSTRATED physically to the jury the mechanics of folding and unfolding the tarp (R 96-101). (Petitioner's Brief, page 48).

Respondent does not purport to point out all of the evidence surrounding the fall, but highlights segments it believes supports its view of the evidence.

Respondent urges that it requested a directed verdict instruction. Respondent neglects to point out to this court, that this requested charge was not given by the trial court, further that respondent did not except to the court's failure to give this instruction (R 494-495).

CONCLUSION

The record remains clear that the lower courts failed even to recognize the applicable law and proceeded to retry the facts in derogation of Petitioner's right to a jury trial and in violation of the Seventh Amendment to the Constitution of the United States. It failed even to consider the facts adduced in support of Petitioner's claim and instead tested the verdict solely by reference to an interpretation in favor of respondent of what was, at best, merely conflicting evidence for respondent. Its failure to consider Washington decisions is also manifest.

Most significantly, respondent in this Court attempts to show by argument only, the courts below did follow the correct rule of law in exercising their review function. Respondent clings tenaciously to its own interpretation of evidence most favorable to it as the premise for the arguments here advanced, which were rejected by the jury which considered all the evidence.

Since these undefended errors of the courts below clearly

violate Petitioner's right to jury trial as well as the Rules of Decision Act, it is submitted that there is clearly presented appropriate occasion for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted.

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